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SUPREME COURT, U.S.

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NO. 07-14

IN THE

SUPREME COURT OF THE UNITED STATES

STANLEY L. WADE,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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CITATION OF OPINIONS BELOW

The Petition for Certiorari was denied on November 5, 2007. The Order and Judgment of the United States Court of Appeals for the Tenth Circuit below was unpublished. It was entered October 30, 2006, at *United States v. Wade*, No. 05-4160, 203 Fed. Appx. 920 (10th Cir. 2006). The Judgment of the United States District Court for the District of Utah, Central Division was unpublished. It was entered June 22, 2005, at *United States v. Wade*, docket #2:04-CR-00141-TS.

STATEMENT OF GROUNDS

Rehearing should be granted, based on substantial grounds not previously considered as to whether the Tenth Circuits' findings regarding the Black letter were factually inconsistent with its other findings, whether Defendant was impermissibly denied the right to confront his accusers, whether

an expert witnesses' opinion of fact and application of the law should have been admitted, and whether Defendant's sentence was erroneous.

ARGUMENT

Point I. The Tenth Circuit's Findings Regarding The Admission Of The Black Letter Are Inconsistent With Other Findings Made In The Same Case And The Record On Appeal.

The Tenth Circuits' decision regarding the Black letter is factually inconsistent with other findings made by the court regarding the nature of the relationship between the Wades, Adam Passey and Troy Powell, and the UBOs. Moreover, rehearing on the petition for certiorari is necessary because the Tenth Circuit's decision conflicts with prior decisions by this Court and constricts the attorney-client privilege such that the privilege will

not protect employees of a business entity where the employee is acting under the direction of management.

This Court has at times recognized new evidentiary privileges necessary to carry out the interests of justice. In *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981), this Court recognized for the first time that an attorney-client privilege exists between a corporation's employees acting at the direction of its officers and the corporation's attorney.

The Tenth Circuit's decision in this case affirmed the trial court's finding that no attorney-client privilege existed between the attorney, Mr. Black and two employees, Adam Passey and Troy Powell, because (1) Stan and Janet Wade "in their individual capacities, were Mr. Black's clients" and

that neither Mr. Passey nor Mr. Powell were employees of the Wades, but of the trusts. *Wade*, 203 Fed. Appx. at 923. These findings by the Tenth Circuit contradict other findings it made, or findings of the district court which it affirmed, stating that the trusts were "shams" and merely the alter- egos of the Wades. Specifically, the Tenth Circuit noted that "the government's entire case was that the UBOs were sham entities, designed to defraud the IRS and later his bankruptcy creditors." *Id.* at 934.

Furthermore, the Government's theory for the case was that the UBOs were mere shams, and the alter egos of Stan and Janet Wade. In its closing argument, the Government argued that the trusts were shams because "the defendant's relationship to the property and the trust was the same before and after." (App. p. 1-2). This

statement is inconsistent with the Government's assertion, and the trial court and Tenth Circuit's findings, that Adam Passey and Troy Powell were employees of the UBOs but not of the Wades. The Government further argued this point in its Brief in Opposition to Petition for Certiorari wherein it stated: "Agent Roberts testified that petitioner should have reported rental income from the UBOs on his own tax returns because the UBOs operated businesses and their income was attributable to petitioner because the UBOs were shams." (Br. for United States In Opposition, p. 3). If the UBOs were the alter egos of the Wades, than it is illogical to also argue that Passey and Powell were not protected by the attorney-client privilege because they were employees of the UBOs. Rehearing is necessary to give Petitioner the opportunity fully to

brief this substantial issue not previously raised.

Point II. The Tenth Circuit Impermissibly Denied Defendant the Right to Confront His Accusers.

The Tenth Circuit incorrectly held that Defendant had no Constitutional protection against the use of out of court statements made by non-witnesses. The Tenth Circuit's decision circumvented the Defendant's Sixth Amendment rights articulated in *Crawford v. Washington*, 541 U.S. 36 (2004).

The Tenth Circuit's findings regarding out of court statements are not consistent with prior decisions of this Court. The Tenth Circuit stated that both Janet Wade and Mr. Kennedy's statements were not offered for their truth. *Wade* at 926.

However, the district court allowed statements by Janet Wade that Defendant was

participating in illegal activity. The Tenth Circuit quoted Janet Wade's testimony that Defendant was "going to get me put in jail over this" and found that her statements were used to show the Defendant intended to commit the crimes for which he was later convicted. Although an argument may be made that Janet Wade and Mr. Kennedy's statements were used to show the Defendant had notice or intent, the ultimate effect was that the statements were incriminating, testimonial in nature, introduced to prove the truth of the matter asserted -- that the Defendant committed the crimes for which he was convicted.

The Defendant's Sixth Amendment right to confront his accusers should not be denied.

Point III. The Admission of an Expert Witnesses' Opinion of Fact and the Applicable Principles of Law Merits Full Review By This Court.

There exists among the Circuits disagreement on the extent to which an expert witness may testify as to legal conclusions. Rule 704(a) of the *Federal Rules of Evidence* permits experts to testify to their opinion even if it embraces an ultimate issue.

The interpretation of Rule 704 varies from Circuit to Circuit creating a disparity that must be clarified by this Court. For example, the First Circuit held that "[i]t is black-letter law that it is not for the witness to instruct the jury as to applicable principles of law, but for the judge." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (quoting *United States v. Newman*, 49 F.3d 1, 7 (1st Cir. 1995). Seven other circuits, including the Tenth, have previously held that the Federal Rules of Evidence prohibit expert testimony instructing

the jury on applicable principles of law. These cases were originally cited to in Petitioner's Petition for Certiorari.

Despite previous decisions by the Tenth Circuit, and similar holdings by other Circuit Courts, the Tenth Circuit in the present case impermissibly allowed the Government's expert, Roberts, to usurp the duty of the trial court to instruct the jury on the applicable principles of law. For example, Roberts freely instructed the jury that rental income paid to the UBOs was reportable on Wade's personal income tax returns under three alternative theories and went on freely to testify regarding legal conclusion after legal conclusion.

Rehearing should be granted to consider on certiorari whether the admission of Roberts' testimony instructing the jury on principles of law

violated the Federal Rules of Evidence.

Point IV. Rehearing Should Be Granted on Petitioner's Sentencing.

The trial court erred where it calculated Wade's sentencing guideline range by considering facts not found by the jury, and by imposing a sentence based on a presentence report without a jury finding the facts to support the guideline calculations. Furthermore, Wade was not given a full hearing to present evidence contrary to the information in the presentence report. The district court's actions resulted in "structural errors" in the way Wade was sentenced.

In *Fulminate v. Arizona*, 499 U.S. 279, 309-10 (1991), this Court stated that structural errors are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards . . . Each of these constitutional

deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."

The structural error in the present case was not allowing Wade to testify or present mitigating evidence or argument at sentencing. Although a sentence within the guidelines is presumptively reasonable per *Rita v. United States*, 127 S. Ct. 2456 (2007), sentencing judges must still consider various mitigating factors including the defendant's age, education and vocational skills, mental and emotional condition, physical condition, employment record, family ties and responsibilities, socioeconomic status, military, civic or charitable works, or lack of guidance as a youth. U.S.S.G. § 5H1.12.

In the present case there was a lack of real

opportunity for Wade to address mitigating factors that would have convinced the trial court to sentence Wade below the applicable sentencing guideline range. This Court should correct this wrong, and ensure that future sentencing courts take the correct steps to ensure that such structural errors do not exist in sentencing.

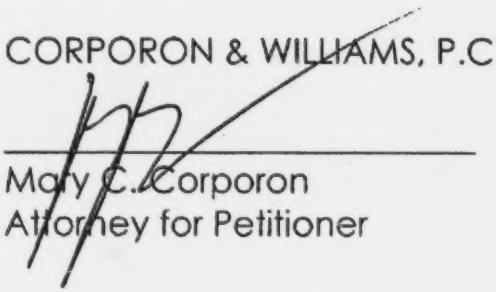
CONCLUSION

Wade should be granted rehearing for the foregoing reasons. Wade should be granted certiorari.

RESPECTFULLY SUBMITTED this 12 day of

February, 2008.

CORPORON & WILLIAMS, P.C.



Mary C. Corporon
Attorney for Petitioner

CERTIFICATION OF COUNSEL

As counsel for the petitioner, I believe this petition for rehearing is made based on other grounds not previously presented and in good faith and in accordance with Rule 44 of the Rules of the Supreme Court of the United States and not for delay.

MARY C. CORPORON
Attorney for Petitioner
Dated: February 6th, 2008

APPENDIX

Transcript of Closing Arguments, March 21, 2005.

Now, there's also been some suggestion, I think during the testimony of Dan Hunter, and also during cross-examination of Agent Roberts, that maybe somehow these trusts could have worked and maybe they didn't owe any money. You remember Mr. Muller questioned Mr. Hunter about the applicability of the grantor trust rule, and I believe he questioned Agent Roberts about that as well, and also about whether you could operate a business trust.

Well, let's take a look at those trusts and the reasons why Mr. Roberts gave you that they didn't work. The first reason is that they're a sham. That is they lack economic substance. What does it mean to lack economic substance? It means the defendant's relationship to the property and the trust was the same before and after. Who testified to that? One of the apartment managers did. I think it was David Schwicht. Adam Passey did, Troy Powell did, Susan Napier did. They all testified that it was Mr. Wade who controlled the apartments. Mr. Wade who controlled the cars, Mr. Wade who controlled

the houses. In short, Mr. Wade who controlled all of the assets and the trusts. Those trusts lack economic substance. They're a sham. That was Mr. Roberts' conclusion based on years of training, based on his extensive understanding of the Internal Revenue Code.

What next? There was some suggestion that maybe– well, or rather Mr. Roberts testified that you couldn't operate a business in a trust the way they did, and that if you do, the income from that business should be reported on the tax returns of the people who are running the business. Well, ladies and gentlemen, you've heard a lot of evidence that this business was run – everyone who testified that there was an active business being operated within this trust. And what did Mr. Hunter say? He said, well, maybe it would be in the context of some sort of IRA, of if you follow some hypertechnical rules, maybe then you could operate a business.